IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1512

RICHARD M. CLOWES, Superintendent of Schools of the County of Los Angeles; HOWARD B. ALVORD, Treasurer and Tax Collector of the County of Los Angeles; LONG BEACH UNIFIED SCHOOL DISTRICT; EL SEGUNDO UNIFIED SCHOOL DISTRICT; BURBANK UNIFIED SCHOOL DISTRICT; BEVERLY HILLS UNIFIED SCHOOL DISTRICT; and SAN MARINO UNIFIED SCHOOL DISTRICT,

Petitioners,

vs.

JOHN SERRANO, JR., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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Petitioners,

vs.

JOHN SERRANO, JR., *et al.*,

Respondents.[1]

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

[1]The respondents are: John Serrano, Jr.; John Anthony Serrano, by John Serrano, Jr., his guardian ad litem; Lillian Acuna Aceves; Billy Aceves, by Lillian Acuna Aceves, his guardian ad litem; Paul Aceves, by Lillian Acuna Aceves, his guardian ad litem; Patrick Aceves, by Lillian Acuna Aceves, his guardian ad litem; Joseph Cain; Silvester Cain, by Joseph Cain, his guardian ad litem; Vanessa Cain, by Joseph Cain, her guardian ad litem; Joanna Denise Cain, by Joseph Cain, her guardian ad litem; Wrenford Boen Hall; Jon Primus Hall, by Wrenford Boen Hall, his guardian ad litem; Peggy J. Kidwell; Elizabeth Adele Evans, by Peggy J. Kidwell, her guardian ad litem; Diane Michelle Evans, by Peggy J. Kidwell, her guardian ad

(This footnote is continued on next page)

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California filed in this proceeding on December 30, 1976, as modified and rendered final by an order filed on February 1, 1977.

Opinion and Judgment Below.

The opinion of the California Supreme Court (which includes the judgment sought to be reviewed by this petition), together with dissenting opinions, is printed as Appendix A in the Appendix, p. 1. It is reported as *Serrano v. Priest* (1976) 18 Cal.3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 [hereinafter "Serrano II"]. The Court's order filed on February 1, 1977, modifying the "dispositive order of judgment" made in the Serrano II opinion, is printed as Appendix B in the Appendix, p. 96. The prior opinion of the California Supreme Court in the same case is printed as Appendix C in the Appendix, p. 97, and is reported as *Serrano*

litem; Stephanie Lyn Kidwell, by Peggy J. Kidwell, her guardian ad litem; Daphne Anne Kidwell, by Peggy J. Kidwell, her guardian ad litem; Mamie Price; James Archer, by Mamie Price, his guardian ad litem; Monica Archer, by Mamie Price, her guardian ad litem; Mona Archer, by Mamie Price, her guardian ad litem; Gene Anthony Price, by Mamie Price, his guardian ad litem; Burrell Price, Jr., by Mamie Price, his guardian ad litem; Gerald Price, by Mamie Price, his guardian ad litem; Marcelene Thomas; Kenneth Lee Plair, by Marcelene Thomas, his guardian ad litem; Willetta Heath, by Marcelene Thomas, her guardian ad litem; Consuelo Valdivia; Fred Valdivia, by Consuelo Valdivia, his guardian ad litem; Mike Valdivia, by Consuelo Valdivia, his guardian ad litem; Esperanza Valdivia; Yolanda Garcia, by Esperanza Valdivia, her guardian ad litem; Rita D. Garcia, by Esperanza Valdivia, her guardian ad litem; Carrie C. Garcia, by Esperanza Valdivia, her guardian ad litem; Victoria Valdivia; William Valdivia, by Victoria Valdivia, his guardian ad litem; Patsy P. Valdivia, by Victoria Valdivia, her guardian ad litem, and, as intervenor, California Federation of Teachers, AFL-CIO,

v. Priest (1971) 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 [hereinafter "Serrano I"]. The vacated opinion of the California Court of Appeal (to which Justice McComb referred as stating his reasons for dissenting in Serrano I), is printed as Appendix D in the Appendix, p. 149, and is reported as *Serrano v. Priest* (1970) 89 Cal.Rptr. 345. The unreported "Memorandum Opinion re Intended Decision" of the trial court, rendered on April 10, 1974 after trial on remand by Serrano I, is printed as Appendix E in the Appendix, p. 161. The unreported judgment of the trial court, affirmed by final order of the California Supreme Court on February 1, 1977, is printed as Appendix F in the Appendix, p. 282.

Jurisdiction.

The judgment of the California Supreme Court in Serrano II was filed on December 30, 1976. A timely petition for rehearing was denied on January 27, 1977. On January 28, 1977, the California Supreme Court extended the time for granting or denying a rehearing to February 2, 1977. On February 1, 1977, the Court modified its dispositive order of judgment ("The judgment is affirmed.") by adding thereto the following sentence: "We reserve jurisdiction for the purpose of considering and acting upon respondents' motion for an award of attorneys' fees on appeal, filed January 28, 1977." The February 1, 1977 order also provided, "The judgment and this order are final forthwith."

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Rule 19(1)(a).

Question Presented.

Whether a final state court judgment, rendered in judicial proceedings in which the Legislature and the Governor were not made parties, was rendered in excess of the court's jurisdiction and thereby abridged 5th and 14th Amendment due process rights assertable by the petitioners bound by the judgment, under the following circumstances:

(1) the judgment declares that certain structural features of the state's school financing system render the system invalid under the state constitution;

(2) the state constitution imposes an affirmative duty upon the lawmakers (the Legislature and the Governor) to provide an ongoing public school system and for its financial support;

(3) no public official or agency other than the lawmakers is empowered to establish or modify the structure of the state's system of financing its public schools;

(4) the relief sought (restructuring the school financing system so that district per-pupil taxable wealth will not influence district per-pupil spending levels) could be afforded only by judicial decrees directed to the non-party lawmakers;

(5) the only relief available by enforcing the judgment against the defendant parties—closing the public schools by enjoining the defendants from implementing the school financing laws—would seriously prejudice the non-party lawmakers with respect to their affirmative duty to provide an ongoing public school system, and would simply constitute an indirect means of coercing the non-party lawmakers to restructure the school financing system so that the system would comport

with the court's view of constitutional requirements; and

(6) restructuring the school financing system as required by the judgment stands to adversely affect vital educational interests of millions of children, most of whom were not represented and who in fact were purportedly represented by the plaintiffs.

Constitutional, Statutory and Administrative Provisions Involved.

The positive enactments involved are:

(1) the 5th and 14th Amendments to the United States Constitution—in particular, the due process clauses thereof;

(2) the following provisions of the California Constitution:

Article I, §7;
Article III, §3;
Article IV, §§1, 10 and 16;
Article IX, §§1, 5, 6, 6½ and 14;
Article XIII, §§1, 14, 20 and 21;

(3) Section 389 of the California Code of Civil Procedure; and

(4) Rule 216 of the California Rules of Court.

These enactments are printed as Appendix J in the Appendix, pp. 322-330.

Statement of the Case.

The State of California maintains a public school system which annually provides a free education to about 4½ million children in kindergartens and grades 1 through 12. In 1973-74 the public schools were

operated and maintained by 1,054 school districts. These were comprised of 689 elementary districts (kindergartens and grades 1 through 8), 114 high school districts (grades 9 through 12), and 251 unified school districts (combining the elementary and high school levels).

California, as is the case in virtually all the states,[2] uses a "foundation program" system of financing its public schools. Under California's system, the sources of current operating revenues for each district are of three types: foundation program revenues, categorical aid funds, and local supplements.

The foundation program revenues may be further broken down into three categories: basic aid, district aid and equalization aid.

Basic aid is an apportionment made by the State to each school district in the amount of $125 per pupil,[3] $120 of which is assured by the California Constitution.[4] *District aid* represents the expected contribution of a district toward achievement of its foundation program. It is computed by determining what the yield would be of a hypothetical tax rate (known as the "computational tax rate") in the district. For example, "district aid" for an elementary district with an assessed valuation[5] per-pupil of $10,000 would

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[2]See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 48-49 (1973).

[3]California Education Code §§17751, 17801.

[4]Article IX, §6, para. 4, Appendix J, Appendix, p. 326.

[5]County assessors are directed to assess property at 25% of full value. Revenue and Taxation Code §401.

be computed at .0223 (the computational tax rate)[6] times $10,000, or $223 per pupil.

The third component of foundation program revenues is *equalization aid*. For any district in which the sum of *district aid* and *basic aid* of $125 per pupil is less than the foundation program, the State apportions *equalization aid* sufficient to produce the foundation program amount. Thus, in the example of an elementary district with a per-pupil assessed valuation of $10,000, and a 1973-74 foundation program of $765 per pupil, the State would apportion equalization aid of $417 per pupil ($765-$125-$223).

The per-pupil foundation program amounts are essentially the same for all districts of the same type, except that the amounts are adjusted upwardly for "necessary small schools" to accommodate their higher per-pupil costs of providing the same education.

In 1973-74, about 85% of the pupils were educated in "equalization aid districts"—districts sufficiently "poor" in per-pupil assessed valuation to qualify for equalization aid.

California's foundation program system thus assures each and every district that it can have sufficient financial resources to provide a basic educational program without excessive local taxation.

By the *categorical aids* component, the state recognizes that some districts must spend more than others in order to provide the same level of educational serv-

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[6]Commencing with the 1973-74 school year the computational tax rates have been $2.23 per $100 of assessed valuation for elementary districts and $1.64 per $100 for high school districts. Unified districts, which combine elementary and high school levels, thus have a computational tax rate of $3.87 per $100 of assessed valuation.

ices. Thus it costs more to educate children with various types of physical, mental and socio-economic handicaps, and some districts must spend more for pupil transportation. To the extent that the state and federal governments perceive and recognize such higher-cost categories of needs, "categorical aids" are provided.

It may be seen that California's system, thus far, provides essentially equal financial resources per educational task unit for all the districts. It is only by virtue of the third major component of the system, *local supplements*, that inequalities in financial resources among the districts can be identified.

The *local supplements* component of the school finance system permits each school district to use local property taxes to raise funds to supplement its foundation program funds and categorical aids. Sections 20 and 21 of Article XIII[7] of the California Constitution provide that, within the limits of such maximum property tax rates as the Legislature may provide, the "Legislature shall provide for an annual levy by county governing bodies of school district taxes sufficient to produce annual revenues for each school district that the district's board determines are required for its schools and district functions." The California Constitution thus specifically requires that some unspecified measure of "local fiscal control" be permitted in the state's school financing system.

California's school finance system was attacked by plaintiffs in 1968 as denying equal protection of the laws under the United States and California constitutions, culminating in the California Supreme Court's final decision and judgment in *Serrano v. Priest* (1976)

[7]Appendix J, Appendix, pp. 328-329.

18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (Appendix A, Appendix, p. 1), hereafter referred to as "Serrano II". It is this Serrano II decision and judgment which petitioners seek reviewed.

Serrano II affirmed a trial court judgment (Appendix F, Appendix, p. 282) which granted plaintiffs their requested declaratory relief with respect to the alleged invalidity of the state's school finance system. The trial court, without having acquired jurisdiction over the legislature or the governor (though urged by defendants to do so), purports by its enforceable declaratory relief judgment to specify powers and duties of the legislature and governor with respect to enacting into law a constitutional school financing system.

More specifically, the trial court judgment affirmed by Serrano II declares that California's school financing system violates the equal-protection-of-the-laws provisions of the California Constitution,[8] but not the equal-protection provisions of the Fourteenth Amendment to the United States Constitution, and goes on to indicate the court's further intention with respect to enforcement of the judgment.

Thus, the judgment goes on to provide that any gradual elimination of the unconstitutional features of the system, by legislative and executive actions, must take place in such a way that the system will be fully constitutional no later than six years from the date of entry of the judgment. Several provisions of the judgment indicate that the court contemplates that the manner in which the school financing system is to be revised in order to conform with California's

[8]Then Article I, §§11 and 21; now Article IV, §16 and Article I, §7, respectively. Appendix J, Appendix, pp. 322-325.

equal-protection provisions is to be by way of "enactment into law" of statutes by the legislature with the approving signature of the governor. The judgment concludes by providing that the trial court is retaining jurisdiction of the action and over the parties so that any party may "apply for appropriate relief in the event that relevant circumstances develop, such as a failure by the legislative and executive branches of the state government to take the necessary steps to design, enact into law, and place into operation, within a reasonable time from the date of entry of this Judgment," a fully constitutional school financing system. (Trial Court Judgment, Appendix F, Appendix, p. 288.)

It is thus clear that the California courts recognize that compliance with the final judgment will require affirmative action on the part of the legislature and the governor, despite the fact the courts had not acquired jurisdiction over either of them.

How Federal Question Was Raised and Further Statement of the Case.

The case commenced with the filing of a complaint in a trial court in Los Angeles, California, in August of 1968. The complaint was captioned "Suit to Secure Equality of Educational Opportunity under Equal Protection Clause of the United States Constitution and California Law and Constitution."

The plaintiff children, 27 in number, sued on their own behalf and on behalf of all other children attending California schools except the schools of that district, "the identity of which is presently unknown", which school district affords the greatest educational opportunity of all school districts within California.

The defendant state officers were Ivy Baker Priest, in her capacity as Treasurer; Max Rafferty, in his capacity as Superintendent of Public Construction (later succeeded by Wilson Riles); and Houston I. Flournoy, in his capacity as Controller. The other named defendants were two county officers, Harold J. Ostly, Treasurer and Tax Collector of the County of Los Angeles, and Richard M. Clowes, Superintendent of Schools of Los Angeles County, who were sued in their official capacities and as representatives of their counterpart officers of each of the other 57 counties of the State. The complaint also designated "Does I through C," as fictitious defendants, but at no time in the proceedings were real defendants named in their stead.

The trial court sustained general demurrers to the complaint, and, upon failure of the plaintiffs to amend, dismissed the complaint. On appeal, the California Supreme Court reversed the trial court judgment of dismissal, holding that the complaint stated facts which, if true, were sufficient to establish that California's school financing system was unconstitutional.

The court pointed out for the benefit of the trial court on remand that if it should determine that the school financing system is unconstitutional, it could properly provide for enforcement of the judgment in such a way as to permit an orderly transition from an unconstitutional to a constitutional system, and that any such judgment should make clear that the existing system was to remain operable until an appropriate new and valid system could be put into effect. (Serrano I, 5 Cal.3d at 618-619, Appendix C, Appendix, pp. 146-147.)

On May 1, 1972, the three state officers filed an answer [Clk. Tr. p. 174] and the two county officers filed a separate answer [Clk. Tr. p. 180].

The answer of the county officers raised numerous affirmative defenses, among which the following are pertinent to the federal question presented. In the tenth affirmative defense, it was alleged that in the event of invalidity of the financing system, "the power to rectify the same lies with the Congress of the United States of America or with the Legislature of the State of California, rather than with the courts." The eleventh affirmative defense asserted that the doctrine of separation of powers as among the legislative, executive and judicial branches of government militates against judicial intervention in the alleged "financing scheme." The fifteenth affirmative defense alleged that the defendants were legally unable, even with the aid of judicial intervention and command, to reallocate the funds available for financial support of the school system, as prayed for by plaintiffs, and that the "only legally constituted body which may do so is the State Legislature, which is not subject to a suit such as this." (Counsel for defendants subsequently realized that the state legislature is subject to a suit such as this.) This defense further asserted that plaintiffs thus sought by indirection to accomplish that which they might not have accomplished directly. The sixteenth affirmative defense asserted that the allocation of public resources for governmental services requires discretionary determinations which must be left to the State Legislature rather than to the courts.

On June 19, 1972, the trial court permitted seven school districts of the County of Los Angeles, including

the school districts joining in this Petition, to intervene as defendants. The school districts joined in and adopted as their own the answer of the County officers.

On November 29 and 30, 1972, the trial court held an official pretrial conference. The trial court had previously indicated its intention that the trial would commence on December 26, 1972. The Los Angeles County Counsel, representing the county officers and the intervening school districts, in the course of voicing objections to proceeding to trial that soon, raised the question of whether indispensable parties were before the court, namely the legislature and (because of his veto power) the governor. Noting that plaintiffs' counsel had requested dismissal of the State Treasurer and the County Treasurer "because they wouldn't contribute anything to this case", the County Counsel noted that, "actually none of the defendants contribute anything to this case, because none of the parties to this case are able to re-structure the finance system of California." It was noted that none of the defendants had been derelict in their duties under the only guidelines they had, namely, the statutory laws which the plaintiffs contended were unconstitutional. The County Counsel further noted that in the event the legislature did nothing in response to a judgment declaring the system unconstitutional, to enforce its judgment the court would be forced to itself re-structure the financing system, and if it were not going to lower the educational opportunities throughout the State, it would have to find additional sources of revenues or reallocate methods of arriving at a school financing system. The trial court judge stated that a motion could be filed to add the legislature, but

that the judge had no intention of granting such a motion; that the case was going to proceed with the parties before it; but if there were deficiencies they could be taken up on appeal; that the court had no intentions "at this late stage—and this case is supposed to be ready for trial—to now bring in any additional parties."[9] [Rep. Tr. pp. A-13 to A-16.]

The trial court then took up the petition for leave to intervene by the California Federation of Teachers, and permitted the requested intervention on the condition that the intervenor adopt all of the allegations of the plaintiffs' complaint as its complaint in intervention, so that no additional issues would be raised.

On December 4, 1972, in further pretrial proceedings, this time with respect to discovery matters, the County Counsel again expressed the belief that the legislature was an indispensable party, and the trial court judge responded that the court had ruled against the County Counsel on that point. [Rep. Tr. p. A-216.]

The trial court then made its pretrial conference order, filed December 13, 1972, which under California law controls over the pleadings in all further proceedings in the case.[10] The pretrial conference order included the following pertinent matters:

First, "The relief which plaintiffs seek is (1) a declaration that the California public school financing system is unconstitutional, (2) an order directing defendants to reallocate school funds so as to remedy this invalidity, and (3) an adjudication that the trial court retain jurisdiction of the action so that it may restructure the California public school financing system if defendants and the California State Legislature fail to do so within a reasonable time." [Clk. Tr. p. 601.]

[9]Under California law, the objection that indispensable parties are not before the court goes to the jurisdiction of the court, and may be raised at any time, even for the first time on appeal. *Covarrubias v. James* (1971) 21 Cal.App.3d 129, 134, 98 Cal.Rptr. 257, 260.

[10]Rule 216, California Rules of Court, Appendix J, Appendix, p. 330.

Second, that the complaint be deemed amended by striking therefrom the allegation that a disproportionate number of school children who are black children, children with Spanish surnames, and children belonging to other minority groups, reside in school districts in which a relatively inferior educational opportunity is provided.

Third, that the complaint be deemed amended with the result that the County officers were sued in their respective official capacities, and not as representatives of a class of treasurers, tax collectors, and superintendents of public schools of the other counties in the state.

Fourth, plaintiffs' request that the action be dismissed as to defendants Ivy Baker Priest, the State Treasurer, and Harold J. Ostly, the County Treasurer and Tax Collector, was denied.

Fifth, the class of children represented by plaintiffs was changed to all children in the State of California attending the public elementary schools, junior high schools, and high schools *other than the children attending such schools in the intervening school districts.*

In the course of the trial, which commenced on December 26, 1972, two of the state officers, Superintendent of Public Instruction Wilson Riles and State

Controller Houston I. Flournoy (who had substituted counsel of their own choosing for the attorney general who had previously represented them), testified on behalf of the plaintiffs. The other state officer, State Treasurer Ivy Baker Priest, continued to be represented by the Attorney General but did not testify. The brunt of the burden of defending the system fell upon the County Counsel of Los Angeles County, representing the two County officers and the intervening school districts.

The trial court entered its judgment in declaratory relief on September 3, 1974. Plaintiffs' counsel moved the trial court for an award of attorneys' fees claimed to be worth $3,619,020 and the court awarded $400,-000 in attorneys' fees to each of the two firms representing the plaintiffs, for a total of $800,000, which judgment was entered against the state officer defendants.

Of the state officer defendants, only the Treasurer, Ivy Baker Priest, filed a notice of appeal from the declaratory relief judgment. (All three state officers appealed from the award of attorneys' fees.) She was shortly succeeded in office by Jesse Unruh, who abandoned the appeal. He nevertheless filed a "Brief of Defendant/Respondent Jesse Unruh, Treasurer of the State of California," asserting that he "strongly supports the trial judge's decision in favor of plaintiffs." Thus two of the state officers chosen by the plaintiffs sided with the plaintiffs throughout the judicial proceedings and the other state officer ultimately sided with the plaintiffs.

The two county officers and five of the seven intervening school districts appealed from the judgment. (All of these appellants are parties to this petition.) In their opening brief they reasserted their contention

that the trial court had no jurisdiction to proceed with the trial in the absence of the legislature and the governor, as indispensable parties to the suit. This brief noted that the effect had been "to deny to the people, including appellant public officers and the citizens of appellant school districts, due process of law under Amendments V and XIV to the United States Constitution and similar guarantees of California's Constitution and laws." (Appendix G, Appendix, p. 294.)

The defendants' reply brief reiterated that the failure of the trial court to order that indispensable parties—the legislature and the governor—be brought into the action resulted in denying defendants due process of law under the United States and California Constitutions. (Appendix H, Appendix, pp. 304 and 306.)

The California Supreme Court, in Serrano II, ruled that the legislature and the governor were not indispensable parties, but failed to make any mention of the defendants' contention that the failure to acquire jurisdiction over the legislature and the governor resulted in a denial of federal and state due process rights. (Appendix A, Appendix, pp. 28-32.)

Defendants filed a petition for rehearing, the second point of which was: "This Court Should Correct Its Error In Holding That the Legislature and the Governor Are Not Indispensable Parties and Restore to Them Their Rights to be Heard, the Ultimate Denial of Which Would Deny Them and the Appellants Due Process of Law Guaranteed by the United States and California Constitutions." (Appendix I, Appendix, p. 310.)

The petition was denied without opinion, and the decision became final on February 1, 1977.

REASONS FOR GRANTING THE WRIT

1. The federal question presented is of great public importance for the following reasons:

a. The vital educational interests of as many as half of California's 4½ million children attending the public schools stand to be adversely affected each year by the Serrano II decision.[11] The interests of only about 125,000, or 5.6%, of the 2¼ million adversely affected children were represented in the judicial proceedings culminating in Serrano II. (These 125,000 pupils are those attending school in the seven school districts which intervened as defendants after the California Supreme Court, in Serrano I (August, 1971), remanded the cause to the trial court.) The interests of the remaining 2 1/8 million adversely affected children were not represented, although *plaintiffs* purported to represent them along with the 2½ million other children who stood to benefit by the suit.

[11]Those children who stand to be adversely affected are those who live in districts of above-average "wealth", i.e., districts in which the value of taxable property divided by the number of pupils is greater than the statewide average for the type of district under consideration. It is readily apparent that about half the pupils live in below-average "wealth" districts and about half in above-average "wealth" districts. Serrano II requires either (1) *actual* equalization of district "wealth" by district reorganization, perhaps assisted by transfer of commercial and industrial property from district tax rolls to a state tax roll, or (2) *artificial* equalization of district "wealth" by a state system of rewarding the tax effort of low-wealth districts and penalizing the tax effort of high-wealth districts so that for all districts of the same type the *net* per-pupil yield of a given tax rate would be the actual yield of that tax rate in a district with a certain per-pupil tax base. The latter alternative is the "district power equalizing" scheme suggested by Coons, Clune and Sugarman in their book Private Wealth and Public Education (1970) Bellknap Press of Harvard Univ. Press, Cambridge, Mass., at 201-242. The Serrano II requirement of actual or artificial equalizing of district "wealth" thus promises to reduce the spending levels for about half of the state's pupils from the spending levels which would be attained with any given level of state and federal support.

Thus millions of children, and future generations of millions of children, have been denied procedural due process of law.[12] These millions of children should have been represented, and they should have been represented by those charged by the California Consituation[13] with the duty to provide for their education, namely, the legislature and the governor.

b. The question presented goes to the heart of the problem of the proper role of the courts in constitutional adjudication where the courts are asked to intervene in the performance of affirmative legislative duties in providing ongoing state programs of vital public importance. Archibald Cox, in his recent book "The Role of the Supreme Court in American Government" (Clarendon Press, Oxford, 1976), states on page 92, "The most ambitious effort to use the Constitution to reform ongoing State Programmes by imposing new affirmative duties came in the area of school financing". This comment came after review of the school desegregation cases and reapportionment cases. Professor Cox went on, at page 93:

> "These aspects of the school-finance litigation are characteristic of the new dimensions of much constitutional litigation:

[12]In *Goss v. Lopez,* 419 U.S. 134 (1975), the Court specified that a child threatened with suspension from school for a few days must be accorded certain minimal procedural due process rights. Petitioners cannot perceive how Serrano II can stand while *Goss v. Lopez* remains standing.

[13]California Constitution, Article IX, Secs. 1, 5, 6, 6½ and 14, and Article XIII, Secs. 20 and 21. Appendix J, Appendix, pp. 325-328.

"1. The suit looked to judicial reform of long-established practices prevailing in virtually every State.

"2. The constitutional claim depended upon group comparisons, asserted a group right, and would have reordered the distribution of tax burdens and revenue benefits among various groups. The State was not classifying individuals in terms of wealth.

"3. The complainants were not seeking to prevent a State from intruding on their right to be left alone, or from regulating their conduct without observing procedural safeguards; they were saying that the State was not operating its educational system in the way which the complainants wished and that it should be required to operate the system differently. The issue concerned the on-going performance of an affirmative State programme. The decree, if the complainants prevailed, would prescribe affirmatively the manner in which the State's duty should be performed."

In recent school finance litigation in New Jersey the complainants did prevail, the state Supreme Court holding that the state had failed to provide a "thorough and efficient" system as specified in the state constitution. When the legislature failed to correct the judicially-noted deficiencies within a reasonable time, the state Supreme Court did in fact find it necessary to order redistribution of certain funds among the school districts contrary to legislative direction, and at one point even found it necessary to enjoin operation of the schools. *Robinson v. Cahill,* 69 N.J. 133, 351 A.2d 713 (1975

—"Robinson IV"), and *Robinson v. Cahill,* 70 N.J. 155, 358 A.2d 457 (1976—"Robinson VI").

In the New Jersey case, however, unlike Serrano II below, the legislature and the governor were at all times parties to the judicial proceedings. It is believed that the New Jersey school finance decisions represent an unparalleled intrusion by the judicial branch of government into the responsibilities of the legislative and executive branches in affirmatively providing ongoing State programs of great public importance. Two of the New Jersey Supreme Court Justices, in Robinson IV, believed that the court majority had gone too far in view of the important separation of powers doctrine. Whether or not the New Jersey Supreme Court extended the judicial power to its ultimate limit in dealing with the legislative and executive branches of government, when those branches were afforded full hearings in court, it is clear that a vital question of public importance is raised by the Serrano II decision where the affirmative responsibilities of the legislature and the governor to provide an ongoing public school system have been intruded upon by the courts without causing the legislature and the governor to be brought in as parties to the judicial proceedings.

The absence of the legislature and governor from court proceedings is especially objectionable in a case such as this, in which the court finds it necessary to instruct the lawmakers concerning the legislation they should enact in reaching solutions to complex statewide school finance problems. In this case, the trial court listed six alternatives to the present school finance system which were, in its opinion, "workable, practical and feasible". [Finding of Fact 198, XI Clk.

Tr. p. 2802.] Neither the legislature nor the governor was before the court to present their views concerning these six alternatives, or for that matter, their views concerning the propriety of treating district wealth as the single villain in the school finance drama. Thus, the court made a determination concerning the workability, practicability and feasibility of legislative proposals without hearing from the branches of government legally responsible for making such determinations. Without participation by the legislature and governor in this case, there was not "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". *Baker v. Carr* (1962) 369 U.S. 186, at 204, quoted with approval in *United States v. Nixon* (1974) 418 U.S. 683, at 697.

If the rule in Serrano II is permitted to stand, public interest and other law firms will be encouraged, in launching monumental class action attacks on the constitutionality of school finance systems and other systems of providing governmental services through local agencies, to seek out defensive "soft-spots", where the motivation and resources to private adequate and appropriate defenses are sorely lacking.

In the case below, the three defendant state officers showed little heart for the defense, and the two defendant officers of Los Angeles County could hardly be expected to have the interest necessary to provide an appropriate defense, inasmuch as the services they provide were not under attack. It was only the intervention of several school districts which believed that their services to their pupils would be adversely affected, that provided motivation for a strenuous defense.

Even so, the value of the legal services mustered by the defense could only have been a small fraction of the value of plaintiffs' legal services, which they claimed were worth $3,619,020, or a small fraction of the $800,000 awarded them by the trial court. Nor could it be expected that these few school districts of above-average or high per-pupil taxable wealth would present the broad view of the state school finance system which would best serve the interests of all pupils of the state, as one would expect of a defense presented by the legislature and the governor.

Further, absent the legislature and the governor there was no defendant before the court which could have entered into any meaningful settlement negotiations with the plaintiffs. Had the legislature and governor been parties, it might have been possible for the plaintiffs to persuade them that the school finance system required some adjustments and the parties might have worked out a proposed settlement, obtained the views of the court thereon, and the lawmakers could have proceeded to enact appropriate legislation to effectuate the settlement. Efficiency in the administration of justice requires that the real parties in interest—those who can settle the lawsuit—be subject to the jurisdiction of the court. The ever-mounting burdens on our nation's courts underline the increasing importance of the judicial policy favoring settlement of legal disputes. To permit Serrano II to stand as precedent would be to subvert this important judicial policy.

c. The federal question presented carries with it important implications with respect to proper application of the fundamental doctrine of separation of powers.

Whether or not the doctrine of separation of powers is an inherent concept of a republican form of government and accordingly guaranteed to the states by Art. IV, Sec. 4 of the United States Constitution—as concluded in *Vansickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223 (1973)—there can be no doubt that it is a doctrine of fundamental significance.

In the decision below the judicial branch has declared the duties of the legislative and executive branches without affording them a hearing in the judicial proceedings.

It is one thing for the judicial branch to inform the legislative and executive branches what they must do to properly carry out duties specifically imposed upon them by the state constitution when they are represented in court;[14] it is quite another thing to do so when they are not. The federal question presented asks whether, in the latter instance, federal due process rights have been violated, due process rights of all the people for whom the legislative and executive branches of government act as *parens patriae.*

There should be no doubt that Serrano II, in suspending the sword of Damocles by a fine hair over the heads of the legislature and the governor—and of millions of the children they are charged to educate —without having heard from them, presents a most important due process question for this Court to resolve.

2. The decision below conflicts in principle with decisions of this Court.

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[14]As in *Robinson v. Cahill,* 69 N.J. 133, 351 A.2d 713 (1975—"Robinson IV"), and 70 N.J. 155, 358 A.2d 457 (1976—"Robinson VI").

In the landmark case of *Pennoyer v. Neff,* 95 U.S. 714 (1877), this Court held that a state court judgment which determines the rights and obligations of parties over whom the court has no jurisdiction is invalid as violating the due process clause of the 14th Amendment to the United States Constitution.

More recently, this Court held that a Florida judgment was void where the court had not acquired jurisdiction over a party which was (under a general rule of law to which Florida adhered) "indispensable". *Hanson v. Denckla,* 357 U.S. 235 (1958). This Court went on to hold that any defendant affected by the court's judgment has that "direct and substantial personal interest in the outcome" that is necessary to challenge whether that jurisdiction was in fact acquired. *Hanson v. Denckla, supra,* 357 U.S. 235, 245.

It is true that in *Denckla* the Florida court had not reached the question of whether the absent party was "indispensable", whereas the California Supreme Court in Serrano II did reach the question and decided that the legislature and the governor were not "indispensable" parties.[15] In doing so the court treated the "indispensable-party, due process" argument as a

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[15]It seems clear that Serrano II employed fallacious reasoning in so deciding. The court relied on language from its leading case of *Bank of California v. Superior Court,* 16 Cal.2d 516, 521, 106 P.2d 879 (1940), stating that "indispensable parties are parties whose interests, rights or duties will inevitably be affected by any decree which can be rendered in the action" and then describing "typical" situations of a number of persons having undetermined interests in the same property or fund. The court concluded, "Manifestly, the Legislature and the Governor have no interest in this proceeding which is remotely comparable to that contemplated by this language." (Serrano II, Appendix A, Appendix, p. 31.) The court thus reasoned from a "typical" situation in an atypical case instead of from its own general rule.

mere "preliminary procedural matter" (Serrano II, Appendix A, Appendix, p. 28) and completely ignored its due process component. Even though this Court generally treats indispensable party issues arising in state courts as matters to be decided by the state courts (*Hanson v. Denckla, supra*), since failure to acquire jurisdiction over indispensable parties can result in federal due process violations, as *Denckla* affirms, the state courts cannot be treated as having the last word as to the indispensability of absent parties. In fact, this Court in *Denckla* reversed the Florida judgment and affirmed the inconsistent Delaware judgment, thereby requiring Florida to give full faith and credit to the Delaware judgment and affording the Florida court no opportunity to decide for itself, in that very case, whether the Delaware trustee was an indispensable party.

It is no answer to say that the legislature cannot be sued. The California Supreme Court was a leader in abolishing the doctrine of sovereign immunity. *Muskopf v. Corning Hospital District,* 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961). Also, the legislature has been a party in certain reapportionment cases decided by the California Supreme Court. *Legislature v. Reinecke,* 6 Cal.3d 595, 603, 99 Cal.Rptr. 481, 492 P.2d 385 (1972); *Legislature v. Reinecke,* 7 Cal. 3d 92, 93, 101 Cal.Rptr. 552, 496 P.2d 464 (1972); *Legislature v. Reinecke,* 10 Cal.3d 396, 110 Cal. Rptr. 718, 516 P.2d 61 (1973).

Nor would there be any merit to a contention that petitioners cannot urge violation of the federal due process clause on the ground they are not "persons" within the meaning of those clauses. The two county

officers included among the petitioners are certainly "persons". Further, this Court has often recognized that in proper cases governmental entities may assert rights of persons for whom they act as *parens patriae.* (See review of cases in *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 257-259.) Also, in *Pierce v. Society of Sisters,* 268 U.S. 510 (1924) this Court held an Oregon compulsory public education law unconstitutional, primarily because of its impact on the rights of pupils and their parents asserted only by the owners of private schools.

One reason given by the Serrano II opinion for refusing to treat the lawmakers as indispensable parties was that to do so "would indeed be to 'thwart rather than accomplish justice.'" (Serrano II, Appendix A, Appendix, p. 32.) This of course assumes that the Serrano II decision, arrived at without hearing from the lawmakers, accomplishes rather than thwarts justice.

But it is far from clear that the 4-3 Serrano II decision accomplishes justice.

This is *not* a school financing case in which the defendants offered local fiscal control simply as an excuse for the status quo, as Mr. Justice Marshall believed Texas was doing, in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 127 (1973). In this case the *plaintiffs* came forward as the "real champions of local fiscal control"[16] and the California Supreme Court acknowledged that the California Constitution mandates that the school financing system allow "for local decision as to the level of school expenditures."[17]

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[16]Respondents' Brief in Serrano II, p. 217.
[17]Serrano II, Appendix A, Appendix, p. 59.

Instead, this is a case in which the defendants proposed that the courts, upon acquiring jurisdiction over the legislature and the governor, could properly undertake the responsibility of assuring a full measure of equality of educational opportunities within the framework of a system which must allow for local fiscal control. Defendants pointed out that the two constitutionally protected values—equality of educational opportunities and local fiscal control—pose a dilemma in designing and monitoring a school financing system. (Allowing local fiscal control results inexorably in differing expenditure levels among the districts.) Defendants noted that the dilemma could be resolved, logically, only by giving each of these constitutional values the relative weight it deserves. This could be done by assuring that a very large proportion of total statewide revenues for schools is devoted to serving equality of educational opportunities while only a correlatively small proportion is devoted to serving local fiscal control. Suppose, for example, the relative values chosen by the court were 90% for equal schooling and 10% for local fiscal control. If the state average expenditure level were $1000 per pupil, the proposed constitutional test would require that the most disadvantaged district (in terms of the ability and willingness of its taxpayers to raise local supplementing funds) would have at least $900 per pupil, plus its local supplements. If the community characteristics of this most disadvantaged district were such that it had 1/3 the average "power" to raise local supplements, an average tax effort in exercising its power would yield it 1/3 the average local supplements of $100, or $33, giving it a total of $933 per pupil, only 6 2/3%. short of the $1000 average.

Under this proposed "optimum balance" test,[18] the system could be easily monitored by the legislature and the courts so as to assure that an optimum balance between equal schooling and local fiscal control is achieved and maintained over the years. Failure of the legislature in any year to provide levels of state support which are nearly adequate, as perceived by the school boards, parents and taxpayers of the districts throughout the state, would inevitably result in their providing disproportionately large local supplements, providing a clear indication of denial of a full measure of equal educational opportunities.[19] In that event the "optimum balance" test would clearly indicate the need for legislative—or even judicial—restoration of the optimum balance. This test would thus assure full measures of equality, and even adequacy, of educational opportunities, as measured by per-pupil expenditures, within the framework of a system which must allow for local fiscal control.

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[18]This test was suggested by a nationally recognized school-finance scholar. Dr. Erick Lindman, then Professor, Graduate School of Education, University of California at Los Angeles. The "optimum balance" test would work hand-in-glove with the "variable standard of review" approach to equal protection analysis advocated by Justice Marshall in his *Rodriguez* dissent, 411 U.S. 1, at 99-111, an approach adopted by the highest courts of New Jersey and Oregon. *Robinson v. Cahill*, 62 N.J. 473, 492, 303 A.2d 273, 282 (1973); *Olsen v. State, Ore.*, 554 P.2d 139, 145 (1976).

[19]Thus, when Serrano I was decided in 1971, state support levels were woefully inadequate as shown by the fact that universally-available foundation program funds and categorical aids accounted for only 76.4% of total district revenues, with local supplements accounting for the remaining 23.6%. The legislative response to Serrano I, SB 90 and AB 1267, in its first year of operation, operated to reduce local supplements to about 10.4% because of dramatically increased foundation programs and categorical aids, which accounted for about 89.6% of total district revenues. Serrano II, Appendix A, Appendix, p. 35.

By way of contrast, the Serrano II decision places *no limit* on the exercise of local fiscal control—it simply prohibits one of many community characteristics —district "wealth"—from playing any significant role therein. The decision places *no limit* on the role to be played by the many other community characteristics which are indicia of the ability and willingness of a district's taxpayers to raise local supplements—characteristics such as family wealth and poverty levels, municipal overburden, ratio of public school children to total population, county assessment ratio, community cost-of-living index, families' educational aspirations as measured by percentage of professionals, college graduates, etc., to name a few.

Thus the Serrano II decision, in and of itself, provides no assurance of either equality or adequacy of educational opportunities. The decision, by simply purporting to neutralize the influence of one community characteristic (district "wealth") on district spending levels, leaving the remaining community characteristics with that much more influence on spending levels, simply requires a reshuffling of high-spending and low-spending districts, with all the chaos that involves for high-wealth districts which must cut back to lower spending levels.

There is no indication that this reshuffling of high-spending and low-spending districts will benefit the children of poor or minority-group families. The plaintiffs dropped their allegation that the system operated to the disadvantage of minority-group children, and made no attempt to show that it disadvantaged the children of poor families. What there is in the record indicates that poor children are just as likely to be

found in high-wealth districts as in low-wealth districts.[20] The Connecticut study referred to in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, at 23, correctly assesses the reason for this—the poor are often clustered around commercial and industrial areas, those same areas that provide the most attractive sources of property tax income for school districts. To this we would add that it is in those same areas that the highest municipal overburdens are often found. In California, the San Francisco Unified School District is a "wealthy" school district, about 2.7 times the average wealth, yet it contains more than its share of poverty-level and minority-group families, while shouldering a heavy municipal overburden. It is far from clear that Serrano II accomplishes rather than thwarts justice, when it is seen that Serrano II slashes the power of high-wealth districts to raise local supplements—simply because they are high-wealth districts—without regard to their other community characteristics which affect their power or need to raise local supplements.

Careful analysis of the California Supreme Court's reasoning process in Serrano I which resulted in the selection of "district wealth" as the villain in the school finance drama leads to only one conclusion—the rea-

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[20]The California State Department of Education's 1972 report, "California State Testing Program, 1969-70" [Defs, Ex. F] showed no significant correlation between Index of Family Poverty and Assessed Valuation per unit of average daily attendance of pupils. The correlation co-efficients were .03, -.03, and -.01 for the three types of districts. [Defs' Ex. F, pp. 571, 574, 577.] As explained in Exhibit F at page 567: "As a rule of thumb, the magnitude of a correlation co-efficient, whether positive or negative, can be interpreted as follows: .0-.2, insignificant; .3-.4, low; .5-.6, moderate; .7-8, substantial; and .9+, high."

soning was fallacious.[21] The Serrano II opinion declined to reanalyze its Serrano I analysis on this critical point, preferring to rest on the "law of the case" doctrine despite this Court's intervening holding to the contrary in *Rodriguez,* 411 U.S. 1. It can hardly be assumed that fallacious reasoning on the most critical point in the case has resulted in accomplishing rather than thwarting justice.

Also, it is far from clear that Serrano II's requirement of district-wealth-equalizing or "district-power-equalizing" provides a better solution to the school finance dilemma than does the optimum balance test

[21]Three fallacies are evident in the following critical paragraph in Serrano I: "More basically, however, we reject defendants' underlying thesis that classification by wealth is *constitutional* so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally *invalid*. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. *Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.*" (Serrano I, 5 Cal.3d at 601, Appendix C, Appendix, pp. 118-119, emphasis added.) *First,* it poses the wrong question at that juncture—whether classification by wealth of a district is *constitutional* or *valid*—rather than the right question, whether district wealth is "suspect". *Second,* it assumes that the asserted justification of the system is that "district wealth" bears a rational relationship to a legitimate legislative objective, whereas the actually asserted justification is that the values inherent in local fiscal control bear such a relationship. *Third,* it proves too much, proving that *any* community characteristic which influences district spending levels and which is irrelevant to the quality of a child's education, is an unconstitutional, invalid or "suspect" classification. Since no such community characteristic is relevant to the quality of a child's education, the Court's proof requires rejection of "local fiscal control". This brings the Court's argument full-circle into contradiction with its Serrano II holding that "local fiscal control" is guaranteed to some degree by the California Constitution, §§20 and 21 of Article XIII.

proposed by the defendants. Surely the lawmakers charged by the state constitution with the duty of educating the children, should have been heard on these complex matters before the courts rendered their decision. Far more is at stake than the few days of suspension from school involved in *Goss v. Lopez,* 419 U.S. 134 (1975), in which this court held that a student threatened with suspension is entitled to a prompt hearing to satisfy due process requirements. Surely a substantial federal question is presented as to whether the millions of California children who stand to be adversely affected by the Serrano II decision were likewise entitled to be heard through their *parens patriae,* the California lawmakers charged with the duty of providing for their education.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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